STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

SONOMA COUNTY LAW ENFORCEMENT ASSOCIATION, Charging Party, v. COUNTY OF SONOMA, Respondent.	Case No. SF-CE-456-M PERB Decision No. 2173-M March 1, 2011

Appearances: Mastagni, Holstedt, Amick, Miller & Johnsen by Kathleen M. Mastagni, Attorney, for Sonoma County Law Enforcement Association; Renne, Sloan, Holtzman & Sakai by Timothy G. Yeung, Attorney, for County of Sonoma.

Before McKeag, Wesley and Miner, Members.

DECISION

MINER, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the County of Sonoma (County) to the proposed decision of an administrative law judge (ALJ). The original complaint alleged that the County violated the Meyers-Milias-Brown Act (MMBA)[1] by unilaterally changing its policy concerning retirement benefits without giving the Sonoma County Law Enforcement Association (SCLEA) notice and an opportunity to meet and confer over the decision to implement the change in policy and/or the effects of the change in policy. Specifically, the complaint alleged that, on or about April 10, 2007, the County unilaterally changed the contribution amount from 85 percent to 84 percent of the premium costs of coverage for eligible retirees and dependents. On July 18,

[1] The MMBA is codified at Government Code section 3500 et seq. Unless otherwise indicated, all statutory references are to the Government Code.

2008, the ALJ granted SCLEA's motion to amend the complaint to clarify the allegations as follows:

> 'Before April 10, 2007, Respondent's policy concerning health insurance contributions for current and future SCLEA retirees was directly tied to the contributions made for active SCLEA bargaining unit members. On or about April 10, 2007, Respondent unilaterally changed this policy by adopting Resolution No. 07-0267, which alters Respondent's health insurance contribution amount for current and future SCLEA retirees by tying them to the contributions made to active unrepresented management members.'

Thus, the essence of the complaint alleges that the County unilaterally changed the manner in which retiree health insurance contributions are calculated from a policy of tying such contributions to the contributions made on behalf of current bargaining unit employees to a policy of tying retiree contributions to the contributions made on behalf of unrepresented management employees.

The ALJ determined that the County violated MMBA section 3505 and PERB Regulation 32603(c)[2] by unilaterally implementing a policy linking health insurance premium contributions of future retirees to those of unrepresented administrative management employees. The ALJ also found that this conduct interfered with the right of County employees to participate in the activities of an employee organization of their own choosing, in violation of MMBA section 3506 and PERB Regulation 32603(a), and denied SCLEA its right to represent employees in their employment relations, in violation of MMBA section 3503 and PERB Regulation 32603(b).

The Board has reviewed the proposed decision and the record in light of the County's exceptions and SCLEA's response thereto, and the relevant law. Based on this review, the

[2] PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

Board reverses the proposed decision and dismisses the complaint and charge for the reasons discussed below.

BACKGROUND

The County is a public agency within the meaning of MMBA section 3501(c). SCLEA is an employee organization within the meaning of Section 3501(a).

Prior to 2000, the County's four law enforcement bargaining units were exclusively represented by the Sonoma County Sheriff's Office Employees Association (SCSOEA). In 2000, the deputy sheriffs were severed from two of the bargaining units and obtained representation by the Sonoma County Deputy Sheriffs' Association. The employee organization representing the remaining employees changed its name to SCLEA and continues to represent four bargaining units under two memoranda of understanding (MOUs).[3]

The County has provided retiree health insurance benefits since 1964. The Sonoma County Employees' Retirement Association (SCERA) administers retiree benefits by collecting funds from retirees for their premium share, adding them to the County's contribution, and paying the insurance carriers. SCERA operates under the authority of the County Employees Retirement Law of 1937, Government Code section 31450 et seq. (County Retirement Law). The County Retirement Law authorizes counties to provide retiree pension and health insurance benefits and also authorizes the establishment of a recognized association to represent the interests of retirees. (County Retirement Law, § 31693.) The Sonoma County Association of Retired Employees (SCARE) is the recognized organization for this purpose under the County Retirement Law. SCARE does not have any collective bargaining authority,

[3] The four bargaining units are: Law Enforcement Non-Supervisory, Law Enforcement Supervisory, Corrections and Probation Non-Supervisory, and Corrections and Probation Supervisory.

but provides information to retirees about retirement benefits. Under Section 31693 of the County Retirement Law, SCARE is entitled to receive reasonable notice of, and an opportunity to comment on, any proposed changes in health care benefits affecting retired employees.

For many years, all employees and retirees received the same health benefits. The County paid 100 percent of employee and retiree health benefit insurance premiums. In the mid-1980s, the County sought to modify its health benefits program by decreasing the County's contribution toward premiums and increasing employee and retiree co-payments. In 1985, the County began to negotiate proposed changes to health benefits with the various County bargaining units. Because not all bargaining units agreed to the same health care benefits and contribution levels, the County decided to "link" health benefits for all retirees, regardless of the bargaining unit they retired from, to the benefit and contribution levels received by unrepresented administrative management employees. Under this approach, the County would not have to continuously track and adjust different retiree contribution levels based on future changes to premium contribution amounts negotiated in each unit. At the time, this decision appeared to be beneficial for retirees because administrative management generally received "one of the better if not the best" package of health benefits among County employees. The assistant County administrator at the time, Mike Chrystal (Chrystal), testified that the decision to link retiree health benefits to administrative management was communicated to the various bargaining units, the County's administrative management council (the non-bargaining representative of management employees) and SCARE representatives. Chrystal further testified that he did not hear any opposition to the linkage. SCLEA's witnesses disputed that SCSOEA (the predecessor to SCLEA) was given notice of the County's decision to link retiree health benefits with unrepresented administrative management and denied having any knowledge of the County's practice prior to April 2007.

During negotiations in 1989 for a new contract, the County proposed establishing a two-tiered system that imposed a length of service requirement before an employee would be eligible to receive retiree health benefits. Existing employees would continue to be eligible for retiree health benefits without regard for their length of service. Employees hired after July 1, 1990, however, would have to work for ten years prior to becoming eligible to receive lifetime retiree health insurance, and would have to work for twenty years to receive additional coverage for a spouse or dependent. For the first time, language concerning retiree health benefits was placed in the 1990-1994 MOUs between the County and SCSOEA. The relevant MOU language[4] stated:

> a. Currently, the County contributes to the cost of a health plan for its retirees and their dependents. For any employee who is newly hired or rehired by the County or any other agency covered by this Memorandum after July 1, 1990, this benefit shall only be available upon the employee's retirement under the circumstances described herein.
>
> b. With respect to this retiree, he or she must have been employed with the County for a period of at least ten (10) years (consecutive or non-consecutive) which may include employment with the County prior to July 1, 1990, and must have been a contributing member (or a contribution was made on the employee's behalf) of the County's Retirement System for the same length of time. Upon meeting these two conditions, the County shall contribute for the retiree only the same amount towards a health plan premium as it contributes to an active single employee in the same manner and on the same basis as is done at the time for other retirees who were hired or rehired before July 1, 1990. The retiree may enroll eligible dependents in the group health plan covering the retiree, but the retiree is responsible for the total dependent(s) premium(s).
>
> c. When such an employee has been employed by the County for a period of at least twenty (20) years (consecutive or non-consecutive) which may include employment with the

[4] The relevant language is identical in the 1990-1994 MOUs covering corrections and probation employees (supervisory and non-supervisory) and law enforcement (supervisory and non-supervisory).

> County prior to July 1, 1990, and has been a contributing member (or a contribution was made on the employee's behalf) of the County's Retirement System for the same length of time the County shall also contribute for one dependent the same amount towards a health plan premium as it contributes to an active employee with one dependent and in the same manner and on the same basis as is done at the time for other retirees who were hired or rehired before July 1, 1990. The retiree with twenty (20) or more years of County service may enroll eligible dependents in the group plan covering the retiree, but the retiree is responsible for the total premium cost of more than one dependent. In no event shall employees hired or rehired after July 1, 1990 be entitled to receive greater contributions from the County for a health plan upon retirement than the County pays for employees hired or rehired before July 1, 1990 upon their retirement.
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> d. Employees who were employed by the County prior to July 1, 1990, but who were laid off thereafter shall not be subject to the restrictions above, provided that they are subsequently restored to County employment and rejoin the Sonoma County Employees' Retirement System.

(Emphasis added.)

SCLEA's witnesses all testified that the negotiations concerning retiree health benefits focused on the tiering proposal and denied that there was ever any discussion about retiree benefits being linked to unrepresented administrative management. Several witnesses testified that they had always understood and "assumed" that retiree benefits would remain the same as those of the bargaining unit from which the employee retired. Former SCSOEA president and negotiator Shaun Du Fosee (Du Fosee) testified that he was told at the time he was hired in 1984 that he would receive the same medical benefits when he retired as when he was working.[5] John Dooley, SCSOEA's co-spokesman during the negotiations for the 1990 MOUs, operated under the assumption that "active employee" meant "bargaining unit employee." Former SCSOEA President Clarence Faria and former County negotiator Gary Zanolini each also testified that they understood "active employee" as used in the MOU

[5] At the time, all County employees and retirees received the same health care benefits.

to mean bargaining unit employee. On the other hand, Chrystal testified for the County that the existing link between retirees and administrative management was discussed during bargaining and that the language was not intended to change that linkage.

The ALJ determined that the testimony of SCLEA's witnesses was more credible than that of Chrystal on the issue of whether the linkage between retirees and administrative management was discussed during the 1989 negotiations. The ALJ further concluded that the evidence failed to establish that the linkage was disclosed during the 1985 negotiations.

Since 1990, the County has continued to provide retirees with the same health insurance benefits it provides to unrepresented administrative management employees. Although the County has adjusted the percentage contribution rate over the years, the premium contribution rates actually paid by retirees have always been the same as those paid by unrepresented administrative management. During most of this same time period, the premium contribution rates paid by employees in the SCLEA bargaining units have been different from those paid by administrative management and retirees.[6] For example, in 1992, the contribution rate for law enforcement non-supervisory employees in the SCLEA bargaining unit was 6 percent of the health care premium, while the rate for administrative management and retirees was 9 percent. In 1994, the contribution rate for bargaining unit employees was 7 percent, while the rate for administrative management and retirees was 11 percent. In 2006-2007, the rate for bargaining unit employees was 15 percent, while the contribution rate for administrative management and retirees was 16 percent. In only five out of the seventeen years between 1991 and 2007 have

[6] A summary of the information contained in open enrollment booklets for this time period indicates that the premium contribution rates paid by both retirees and administrative management employees during this time period were equal to or higher than those paid by current bargaining unit employees.

retirees and administrative management employees paid the same amount for health insurance premiums as bargaining unit employees.

Changes to the plan design and the linkage with administrative management were also discussed at meetings of the County's Joint Labor Management Benefits Committee (JLMBC) in 2003 and 2004. All employee organizations and SCARE are invited to attend these meetings, and all receive copies of the agendas and minutes whether they attend or not. Du Fosee attended those meetings regularly on behalf of SCLEA and was an active participant. At the meetings, County representatives distributed open enrollment booklets that identified the premium rates applicable to each plan. A separate booklet covered retirees. County Risk Manager Marcia Chadbourne (Chadbourne) testified that the issue of the linkage between retirees and administrative management came up frequently at JLMBC meetings and that SCARE representatives "would always make mention of the linkage to administrative management and that the County couldn't change anything for them unless they changed it for administrative management." For example, during the course of two or three JLMBC meetings in 2003, the County discussed eliminating its prescription drug coverage for retirees and implementing the Medicare Part D prescription drug plan instead. However, the County did not make the change after the retirees "emphasized very strongly that they were tied to administrative management, and if the County were to make any changes to the prescription drug benefit that it would have to make the same change for administrative management because they've always been tied to the same benefit as administrative management."

Chadbourne further testified that it was "common knowledge" that retirees were linked to administrative management. The minutes of the March 4, 2004 meeting state that, after a question was raised regarding whether active employees are funding the retiree health program, it was explained that active employees do not contribute to retiree medical benefits,

the agreement made between SCARE and the County in 1985 ties retirees to administrative management costs, and that retirees are required to make the same contribution toward medical benefits as active administrative management employees. The minutes of the March 18, 2003 meeting indicate that health plan changes were discussed at that meeting and include, as an attachment, a chart showing agreed-upon changes to deductibles and co-payments for the various bargaining units that would become effective in July 2003 and July 2004. The chart indicates that different changes would be implemented at different times for the different bargaining units, and lists retirees for all units separately. The chart was also included in the open enrollment booklets distributed to employees and retirees and made available at the JLMBC meetings.

Du Fosee was present at both of these meetings and others, but stated that he did not recall any discussion of a linkage between retirees and administrative management. He did not, however, deny that such discussions occurred. In addition, he testified that SCLEA did not investigate whether the County was complying with his understanding of the MOU provision.

The linkage between retirees and administrative management is also identified in a four-page "Frequently Asked Questions" booklet produced in 2003 by the County's risk management staff and distributed to employees considering retirement and at retiree pre-planning workshops. The booklet states:

> WHO DETERMINES HOW MUCH I PAY FOR HEALTH INSURANCE?
>
> Retirees have traditionally been linked to county management concerning insurance contributions. Retirees pay a monthly contribution equivalent to management's bi-weekly contribution. Currently retiree's [sic] pay 15% of the total premium cost.

Finally, the existence of a linkage between retirees and administrative management is reflected in correspondence between SCARE representatives and the County. For example, a letter dated February 16, 2007 from Richard Gearhart, SCARE president and former director of human resources/personnel for the County, to the current director of human resources repeatedly asserts that retiree health insurance benefits are to be linked to administrative management. Similarly, a letter dated January 31, 2001, from then-SCARE President Maureen Latimer to Chrystal refers to the existence of that link since 1985.

In summary, the evidence demonstrates that, notwithstanding any ambiguity in the contract language and the subjective beliefs of some SCLEA representatives, the County had a longstanding practice of providing the same health insurance benefits to retirees as it did for unrepresented management, and that it provided different benefits to current SCLEA bargaining unit employees. SCARE supported and advocated for the continuation of this practice for over 20 years. The practice is reflected in documents distributed to employees and was discussed at JLMBC meetings in the presence of SCLEA's representative.

The County has never maintained records identifying retirees by bargaining unit or former employee classification. Thus, in order to tie retiree health insurance benefits to the benefits received by current bargaining unit employees, the County would have to determine the job classification and bargaining unit in which the retiree was employed prior to retirement. In cases where the classification no longer exists, the County would have to determine which classification and bargaining the retiree should be assigned for purposes of determining retiree health benefits. In addition, where retirement benefits are being provided to survivors of retirees, a determination would have to be made concerning the bargaining unit to which the retiree belonged at the time of retirement. SCERA also does not have the ability to track individual retirees by bargaining unit and has never done so.

2007 Resolution

Prior to 2007, the County paid 84 percent of the total premium for any medical plan for unrepresented management and retirees. At the January 25, and February 6, 2007 JLMBC meetings, County Human Resources Director Ann Goodrich (Goodrich) discussed a proposal to make changes to the health plan design and contribution methodology, known as the "85-Y" plan. Under this plan, the County would limit its contribution to 85 percent of the lowest cost medical plan and cease making contributions that exceeded that amount until the lowest cost plan contribution reached that amount. The County requested that the bargaining units reopen negotiations early to consider this proposal, but they declined to do so. Goodrich further testified that, at the meetings, the County stated it would go forward and implement the changes for unrepresented management and that both she and Employee Relations Manager Ken Couch stated that, since the retirees were tied to unrepresented management, the change would affect them as well. Du Fosee was present at the January 25, 2007 meeting.

On April 10, 2007, the County's Board of Supervisors adopted a resolution implementing the 85-Y plan for unrepresented management employees and retirees, effective July 1, 2008. Following negotiations with SCLEA and reaching impasse, the County unilaterally implemented the 85-Y plan on the SCLEA bargaining unit in January 2008.[7]

THE COUNTY'S EXCEPTIONS

The County advances four principal arguments. First, the County contends that the charge is time-barred because SCLEA knew or should have known of the County's actual practice of linking retiree health benefits to administrative management more than six months prior to filing the charge. Second, the County asserts that the MOU language does not link

[7] After the appeal in this case was filed, the Board determined that the County's unilateral implementation did not violate the MMBA. (*County of Sonoma* (2010) PERB Decision No. 2100-M.)

retiree health benefits to current unit employees and that, therefore, the County did not engage in an unlawful unilateral change in an established policy or past practice. Third, the County contends that retiree health insurance benefits are not within the scope of representation. Finally, the County contends that the remedy imposed by the ALJ inappropriately extends to retirees who were not employees at the time the charge was filed.

DISCUSSION

Statute of Limitations

PERB is prohibited from issuing a complaint with respect to any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge. (*Coachella Valley Mosquito & Vector Control Dist. v. California Public Employment Relations Bd.* (2005) 35 Cal.4th 1072.) The limitations period begins to run once the charging party knows, or should have known, of the conduct underlying the charge. (*Gavilan Joint Community College District* (1996) PERB Decision No. 1177 (*Gavilan*).)[8] A charging party bears the burden of demonstrating that the charge is timely filed. (*Tehachapi Unified School District* (1993) PERB Decision No. 1024; *State of California (Department of Insurance)* (1997) PERB Decision No. 1197-S.) In unilateral change cases, the limitations period begins to run when the charging party has actual or constructive notice of the respondent's clear intent to implement a unilateral change in policy, provided that nothing subsequently evinces a wavering of that intent. (*The Regents of the University of California* (1990) PERB Decision No. 826-H.) Thus, a charging party that rests on its rights until actual implementation of the change bears the risk of running afoul of the statute of limitations. (*South Placer Fire Protection District* (2008) PERB Decision No. 1944-M.) While an employer's official notice

[8] When interpreting the MMBA, it is appropriate to take guidance from cases interpreting the National Labor Relations Act and California labor relations statutes with parallel provisions. (*Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608.)

to the union is a factor in determining whether the employer made an unlawful unilateral change, such notice is not required in determining whether the charge was filed within the statute of limitations; rather, the question is whether the union had or should have had knowledge. (*City of Alhambra* (2009) PERB Decision No. 2036-M, adopting ALJ's proposed decision citing *Gavilan*, *supra*, and *Grant Joint Union High School District* (1982) PERB Decision No. 196 (*Grant*).)

The amended complaint alleges that the operative unilateral change was the County's April 2007 resolution altering the County's policy on retiree health insurance contributions by tying them to the contributions made for active unrepresented management employees. Thus, SCLEA does not challenge directly the change in contribution rates from 85 percent of any plan to 85 percent of the lowest cost plan. Rather, SCLEA asserts that the 2007 resolution changed the linkage of retiree benefits from a link with current bargaining unit employees to a link with administrative management employees. However, such a change, if any, occurred not in April 2007 but much earlier in 1985, when the county began negotiating different health care benefits with different bargaining units, or in 1990, when the parties agreed to language in their MOU expressly addressing the issue of retiree health care benefits. The 2007 resolution did not change the linkage, but only changed the contribution rate for administrative management and, consequently, retirees. The 1990 MOU changes did not change the past practice regarding linkage, but only established a two-tier system of eligibility for retiree health care benefits.

The evidence established that the County had a practice for over 20 years of linking retiree health insurance benefits to benefits received by administrative management. In his capacity as SCLEA's representative, Du Fosee regularly attended JLMBC meetings where the linkage was discussed, most significantly the March 4, 2004, meeting for which the minutes

specifically reflect that it was explained to those present that the agreement made between SCARE and the County in 1985 ties retirees to administrative management costs, and the March 18, 2003, meeting during which a chart showing agreed-upon health care plan changes shows retirees listed separately from bargaining unit employees. In addition, in 2003, there were extensive discussions at several JLMBC meetings about a proposal by the County to eliminate the prescription drug benefit and implement the Medicare Part D plan. The retirees present at these meetings objected strenuously to the County's proposal, arguing that the County could not eliminate the benefit because the retirees' health benefits were linked to those of the administrative management employees. Moreover, the existence of the linkage was discussed at the January 25, 2007 meeting, in Du Fosee's presence, when the County stated its intention to implement the 85-Y plan for unrepresented management and retirees. The agenda and minutes of those meetings were provided to SCLEA and other employee organizations, whether or not they attended.

Given Du Fosee's active participation in the JLMBC where the linkage between administrative management and retirees was clearly and openly discussed on many occasions, and given SCLEA's status as the exclusive representative of bargaining unit employees and future retirees, we find it implausible that SCLEA was unaware that the County had a practice for over 20 years of making contributions for retiree health benefits that differed from those paid on behalf of current bargaining unit employees. Thus, we conclude that SCLEA knew or should have known of the County's practice of paying the same contributions for retirees as it did for administrative management long before April 2007. Accordingly, the charge filed on August 1, 2007 was not timely filed.

Unilateral Change

We next consider whether, even if the charge were timely filed, the evidence established an unlawful unilateral change. In determining whether a party has violated MMBA section 3505 and PERB Regulation 32603(c), PERB utilizes either the "per se" or "totality of the conduct" test, depending on the specific conduct involved and the effect of such conduct on the negotiating process. (*Stockton Unified School District* (1980) PERB Decision No. 143.) Unilateral changes are considered "per se" violations if certain criteria are met. Those criteria are: (1) the employer breached or altered the parties' written agreement or its own established past practice; (2) such action was taken without giving the other party notice or an opportunity to bargain over the change; (3) the change was not merely an isolated breach of the contract, but amounts to a change in policy (i.e., it has a generalized effect or continuing impact upon bargaining unit members' terms and conditions of employment); and (4) the change in policy concerns a matter within the scope of representation. *(Vernon Fire Fighters v. City of Vernon* (1980) 107 Cal.App.3d 802; *Walnut Valley Unified School District* (1981) PERB Decision No. 160; *San Joaquin County Employees Assn. v. City of Stockton* (1984) 161 Cal.App.3d 813; *Grant*.)

Written Agreement

The parties each argue that Section 18.16 of the MOU established a contractual basis for determining retiree health insurance benefits. SCLEA asserts that "the plain language of Section 18.16 links current SCLEA bargaining unit members to retired SCLEA bargaining unit members," and that "[t]he parties' bargaining history shows that both parties have consistently understood and utilized the term 'active single employee' as meaning a single, active SCLEA member." The County, on the other hand, asserts that Section 18 codified the parties' practice of linking retiree health benefits to unrepresented management. For the following reasons, we

conclude that the contract language is ambiguous and does not clearly support either party's interpretation.

Although PERB does not have jurisdiction to resolve pure contract disputes, it may interpret contract language if necessary to do so to decide an unfair practice charge case. (*Regents of the University of California (Davis)* (2010) PERB Decision No. 2101-H (*Regents*); *County of Ventura* (2007) PERB Decision No. 1910-M.) In such cases, traditional rules of contract law guide the Board's interpretation of collective bargaining agreements. (*Regents*; *National City Police Officers' Assn. v. City of National City* (2001) 87 Cal.App.4th 1274, 1279; *Grossmont Union High School District* (1983) PERB Decision No. 313.) A contract must be interpreted so as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful. (Civ. Code, § 1636.) Where contractual language is clear and unambiguous, it is unnecessary to go beyond the plain language of the contract itself to ascertain its meaning. (Civ. Code, § 1638; *City of Riverside* (2009) PERB Decision No. 2027-M; *Marysville Joint Unified School District* (1983) PERB Decision No. 314 (*Marysville*).) "The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other." (Civ. Code, § 1641.) Thus, "the Board must avoid an interpretation of contract language which leaves a provision without effect." (*State of California (Department of Corrections)* (1999) PERB Decision No. 1317-S.) However, where the contract language is silent or ambiguous, the policy may be ascertained by examining past practice or bargaining history. (*Marysville*, *supra*, citing *Rio Hondo Community College District* (1982) PERB Decision No. 279 and *Pajaro Valley Unified School District* (1978) PERB Decision No. 51; *King City Joint Union High School District* (2005) PERB Decision No. 1777.)

The operative language of Section 18.16 states that the County "shall contribute for the retiree only the same amount towards a health plan premium as it contributes to an active single employee in the same manner and on the same basis as is done at the time for other retirees who were hired or rehired before July 1, 1990." Nowhere in the MOUs is the term "active single employee" (or "active employee") defined. While Section 3.2 of the MOUs defines "Employee" as "any person legally employed by the County and a member of the bargaining unit represented by the Association," nothing on the face of the contract indicates that "employee" as used in Section 3.2 is synonymous with "active single employee" as used in Section 18.16. Such a construction would appear to be inconsistent with Section 3.1, entitled "Non-Application," and which states: "None of the following definitions are intended to apply in the administration of the County Employees' Retirement Law of 1937 or to the County's Civil Service Ordinance nor the Rules of the Civil Service Commission."

Adding to this ambiguity is the language in Section 18.16 that specifies that retiree contributions are to be made "in the same manner and on the same basis" as is done for other retirees hired or rehired before July 1, 1990. In the absence of any further explanation of this provision, we find the contract language ambiguous as to the meaning of the term "active single employee" and the manner and basis upon which contributions are to be made.

Because the contract language is ambiguous, we look to extrinsic evidence to determine the parties' intent. The parties dispute the manner and basis in which contributions were made for retirees both prior to July 1, 1990 and thereafter. Nothing in the record before us indicates that, during the 1989 negotiations over Section 18.16, the parties ever discussed the meaning of the term "active single employee" or the manner and basis upon which retiree health insurance contributions were to be made. Instead, both parties acknowledge that the negotiations focused only on the County's "tiering" proposal that established waiting periods before employees

hired after July 1, 1990 would be eligible to receive retiree health care benefits. While the SCLEA witnesses testified that they "assumed" retiree health benefits would be linked to the benefits received by current bargaining unit employees, there was no evidence that such a linkage was ever discussed or that it had ever existed. Instead, the only evidence of a discussion of the linkage came from Chrystal, who testified that the linkage with administrative management was discussed during negotiations.

Based upon our review of the MOU and the extrinsic evidence, we conclude that the MOU does not establish a written agreement to link retiree health insurance benefits to current bargaining unit employees. Therefore, we consider whether the County has breached an unwritten but established past practice.

Past Practice

For a past practice to be binding, it must be: (1) unequivocal; (2) clearly enunciated and acted upon; and (3) readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties. (*Desert Sands Unified School District* (2010) PERB Decision No. 2092; *Riverside Sheriff's Assn. v. County of Riverside* (2003) 106 Cal.App.4th 1285, 1291.) PERB has also described an enforceable past practice as one that is "regular and consistent" or "historic and accepted." (*Hacienda La Puente Unified School District* (1997) PERB Decision No. 1186, adopting proposed dec. of the ALJ, at p. 13; *County of Placer* (2004) PERB Decision No. 1630-M. See also, *County of Sacramento* (2009) PERB Decision No. 2043-M (*County of Sacramento I*); *County of Sacramento* (2009) PERB Decision No. 2044-M (*County of Sacramento II*); *County of Sacramento* (2009) PERB Decision No. 2045-M (*County of Sacramento III*) cases, finding 20-year practice of providing retiree dental and medical insurance to constitute a binding past practice.) The burden is on SCLEA to establish that the County breached an established past practice. (*San Francisco Unified School*

District (2009) PERB Decision No. 2057; *City of Commerce* (2008) PERB Decision No. 1937-M.) To do so, SCLEA must plead and prove facts demonstrating the unequivocal, fixed, and longstanding past practice. (*Regents of the University of California* (2010) PERB Decision No. 2109-H.)

The evidence presented does not establish that the County had an unequivocal, clearly enunciated and acted upon, and readily ascertainable past practice, accepted by both parties, of linking retiree health insurance benefits to the benefits received by current bargaining unit employees. Nor does the evidence establish that such a practice was "regular and consistent" or "historic and accepted." While SCLEA may have believed this to be the practice, it did not rebut the County's evidence that, in fact, the actual contributions paid by the County on behalf of retirees since at least 1990 exactly mirrored those paid on behalf of unrepresented management, and were different from those paid on behalf of bargaining unit employees. Coupled with evidence that the linkage with administrative management was reflected in documents provided to potential retirees and discussed repeatedly at JLMBC meetings at which the SCLEA president was present and whose agenda and minutes were provided to SCLEA, correspondence with SCARE representatives, and the testimony of the County's witnesses that the County and SCARE lack the ability to track retirees by bargaining unit, we cannot conclude that SCLEA established the existence of a binding past practice of linking retiree health benefits to the benefits received by bargaining unit employees. Accordingly, SCLEA has not met its burden of proving a unilateral change in an established past practice.[9] Therefore, a prima facie case of unlawful unilateral change has not been established.[10]

[9] Because we find that SCLEA failed to meet its burden of proving the existence of an established past practice, we need not reach the issue of whether the other elements of a prima facie case of unilateral change were met. Were we to do so, however, we would reject the County's argument that Section 31962 excludes the retiree health insurance benefits at issue in this case from the scope of representation. It is well established that, while an employer has no

ORDER

The complaint and underlying unfair practice charge in Case No. SF-CE-456-M are hereby DISMISSED.

Members McKeag and Wesley joined in this Decision.

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duty to bargain over retiree health insurance benefits, the future retirement benefits of current employees, including retirement health benefits, are mandatory subjects of bargaining. (*County of Sacramento I*; *County of Sacramento II*; *County of Sacramento III*; *Madera Unified School District* (2007) PERB Decision No. 1907.) While a subject governed by a mandatory statute that "clearly evidences an intent to set an inflexible standard or insure immutable provisions," (*San Mateo City School Dist. v. Public Employment Relations Bd.* (1983) 33 Cal.3d 850) may preclude collective bargaining over a subject governed by the statute (*Board of Education v. Round Valley Teachers Assn.* (1996) 13 Cal.4th 269), Section 31692 of the County Retirement Law expresses no such intent. Instead, it authorizes the County to amend or repeal an ordinance or resolution providing for such benefits, but is silent on the issue of whether such amendment or repeal may be bargained. Requiring the County to bargain prior to implementing such a change is not inconsistent with the language of Section 31692. Accordingly, we conclude that Section 31692 does not supersede the obligation to bargain over the retiree health benefits in this case.

[10] The County argues that the remedy imposed by the ALJ inappropriately extends to retirees who were not employees at the time the charge was filed. Because we dismiss the complaint, we need not reach this issue. However, were we to do so, we would reject the County's argument. (*County of Sacramento III*; *Holtville Unified School District* (1982) PERB Decision No. 250; *Corning Union High School District* (1984) PERB Decision No. 399.)